89-437

Supreme Court, U.S.
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No.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1989

Scott Robert Diefenbach and Julie Diefenbach,
Petitioners,

vs.

The State of Washington
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RICHARD BRENT DANIEL
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Seattle, WA 98121
(206)441-1980
ATTORNEY FOR THE PETITIONERS

34 pp

QUESTION PRESENTED

Whether a reasonably well-trained police officer could have believed that there existed probable cause to search your Petitioners' home on the basis of an affidavit stating solely that a reliable informant, within the past 48 hours, saw and used cocaine during the purchase of cocaine; and which related no specifics as to amounts, individuals involved, relationship to the premises sought to be searched or indications of any past or contemplated future transactions at the Petitioners' home?

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SCOTT ROBERT DIEFENBACH and JULIE DIEFENBACH,
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THE STATE OF WASHINGTON,
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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON

Petitioners, Scott Robert Diefenbach and Julie Diefenbach pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of Washington, dated March 23, 1989.

QUESTION PRESENTED

Whether a reasonably well-trained police officer could have believed that there existed probable cause to search your Petitioners'

home on the basis of an affidavit stating solely that a reliable informant, within the past 48 hours, saw and used cocaine during the purchase of cocaine; and which related no specifics as to amounts, individuals involved, relationship to the premises sought to be searched or indications of any past or contemplated future transactions at the Petitioners' home?

OPINIONS BELOW

The Findings of Fact and Conclusions of Law by the Honorable Evan E. Sperline, Judge of the Superior Court of Grant County, Washington, are unreported and are reprinted as Appendix A to this Petition. The opinion of the Court of Appeals of the State of Washington, Division III, is also unreported. The notation to the unpublished opinion is reported at 53 Wn.App. 1066 (1989). A copy of the unpublished opinion is attached as Ap-

pendix B to this Petition. A facsimile of the letter from the Clerk of the Supreme Court of Washington announcing that Court's denial of the Petition for Review of the Washington Court of Appeals decision is attached as Appendix C to this Petition.

JURISDICTION

Review was denied by the Supreme Court of Washington by Order entered on June 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States, which provides:

> The right of the people to be secure in the persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On July 21, 1986, Scott and Julie Diefenbach were charged by information with one count of violating the Uniform Controlled Substance Act. The information was based on evidence seized pursuant to the search warrant for the residence of the petitioners, executed on May 17, 1986, which search warrant was signed by Honorable W. Edward Allen on My 16, 1986.

The Diefenbachs filed motions to suppress the evidence based on the Fourth Amendment to the United States Constitution and on the Washington Constitution. A hearing on the motions to suppress was held on August 28, 1987, in which Diefenbachs objected to the admission of certain evidence because the affidavit upon which the search warrant was based, contained insufficient facts for an independent magistrate to find probable case

to allow a search of the Diefenbachs' residence. A copy of the affidavit for search warrant is attached as Appendix D to this Petition. The trial court granted the defendants' motion to suppress, concluding that there was nothing in the affidavit that would give the magistrate issuing the search warrant probable cause to believe that cocaine was present in the Diefenbachs' residence at the time the search warrant was signed the magistrate.

On October 16, 1987, the State filed a Notice of Appeal. The Court of Appeals, on March 23, 1989, vacated the order suppressing evidence seized during the search of the Diefenbachs' residence and remanded for trial.

REASONS FOR ALLOWING THE WRIT

The portion of the affidavit containing the allegations operative to any possible finding of probable cause reads as follows:

> Within the last 48 hours of today's date, May 16, 1986, the affiant was contacted by a reliable confidential informant and advised that the informant had been at the residence of Scott R. Diefenbach, residing approximately one mile east of Road "O" Southwest on the north side of Road 25 Southwest, Wahluke Slope, east of Mattawa, Grant County, Washington, and informant states observed cocaine in the residence, and further, used cocaine in that residence during the course of purchasing cocaine, all within the last 48 hours.

The remainder of the affidavit is devoted solely to establishing the reliability of the informant, a matter that is not at issue here. The Petitioners respectfully submit that the subject affidavit defines the term "'bare bones' affidavit" referred to by this court in United States v. Leon, 468 U.S. 897 at 926 (1984).

This Court has recognized that deference to a magistrate is not boundless. Id. at 914. An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause. Illinois v.

Gates, 462 U.S. 213 (1983). If a reasonably well-trained police officer should have been aware that an affidavit failed to provide a substantial basis for determining probable cause, then the exception to the exclusionary rule enunciated in Leon is inapplicable. United States v. Leon, supra at 926.

To fairly evaluate what inferences the operative allegations of the affidavit, noted above, would reasonably support, its omissions as well as its allegations must be examined. Affirmatively, the affidavit relates: first, the tipster identifies only one encounter with the subject residence; second, the unspecified time of the alleged observations spans a 48 hour period; third, fourth, and fifth, he allegedly observed, used, and purchased an unidentified quantity of cocaine from an unidentified source. More significantly, the affidavit fails to relate

the amount observed, used and purchased. The affidavit fails to relate where in the Diefenbach home these events occurred. The affidavit fails to aver either the presence or the participation of the Petitioners. The affidavit fails to provide facts that might indicate that quantities of cocaine beyond the amount allegedly observed, used and purchased, and, ostensibly removed, existed at any time after its removal or would exist at the Diefenbach home as long as 48 hours later. No facts are related that would imply that the Diefenbach home was a place of operation. There are no allegations that there had ever been any previous drug transactions. There are no allegations that would indicate that future transactions were contemplated. The affidavit fails to allege any facts that would preclude the likely conclusion that an unidentified party provided the alleged

cocaine from his person in a manner entirely unconnected with the Diefenbach home. The transaction related could have occurred between two police informants while they were locked alone in the bathroom. The Respondents respectfully submit that the affidavit, without something more, relates mere suspicion, and that a reasonably well-trained police officer would have known this.

— To illustrate further, consider the following diagram: "Informant

states [he] observed [one ton of / one ounce of / one gram of / one line of / one speck of] cocaine,

used [five grams / all of the / most of the] cocaine during the

course of purchasing [all of the / one gram of / one pound of] cocaine,

all within the last 48 hours."

It is readily apparent that on the basis of the facts actually provided, no "probable" inference can be drawn. If additional facts had been provided, as in the diagram, it might have been possible to determine whether there was a substantial basis for determining the existence of probable cause. What was actually given the magistrate was only fuel for conjecture so deficient that the affiant and executing officer could not reasonably presume it to be valid.

The Fourth Amendment to the United States Constitution requires that "inferences [must] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14 (1946). None of the possible inferences flowing from the

affidavit, regarding the probability of contraband still being present, is more likely than any other, i.e. on the basis of the affidavit it is equally probable that no contraband would be found. A reasonably well-trained officer would know this. Had the tipster alleged that he made his observation within the last 48 minutes instead of the last 48 hours it might be a close case.

Validation of the admission of the evidence seized pursuant to this bare bones affidavit is fraught with dangers that are not immediately apparent. It cannot be disputed that one of the purposes of the Fourth Amendment is to insure a citizen's right to freedom from unreasonable government intrusion. A person's expectation of privacy, a cornerstone of when governmental intrusion will be deemed reasonable, is also esteemed as an aspect of polite society. If the invasion

of Scott Diefenbach's home is found reasonable here, it must follow that it is acceptable for the government to require Scott to monitor and police the private activities of any and all entrants to his home or else risk official intervention. If the instant affidavit is found to pass constitutional and statutory muster, Scott's domestic privacy and security may depend on the clandestine activities of his guests. Must he strip search his guests before they are admitted? Must he oversee or otherwise maintain surveillance over their doings while they are locked in his bathroom or other private portions of his home? Must he retain private security personnel to covertly mingle in the social activities? Perhaps such security personnel should invite illegal transactions from his guests in order to ferret out and remove potential wrongdoers, and thus minimize the risk of a midnight siege

by a team of heavily-armed sheriff's police intent on examining all of his personal papers and possessions? Maybe it would be safest to never allow anyone into his home. Under the facts of this case, the security of one's home may be dependent upon the unknown activities of persons who could care less, or worse, of persons with an axe to grind. These are just a few of the disquieting ramifications that approval of the execution of a search warrant based on the type of affidavit submitted by the police in this case might engender.

Justice Blackmun, in his concurring opinion in United States v. Leon, supra, notes the "provisional nature" of the rule of Leon, and promises that "this Court will attend to the results." Id. at 927. Your Petitioners respectfully submit that positing good faith in the officers and affiant of the subject affidavit strains credulity.

The Petitioners respectfully submit that the outer limits of the good faith exception to the exclusionary rule announced in United States v. Leon, Id. have not been, but should be, settled by this Court. The instant case exhibits a fact pattern conducive to review. The affidavit is truly a bare bones affidavit. No reasonably well trained police officer could rely on it.

CONCLUSION

Wherefore, your Petitioners, Scott Robert Diefenbach and Julie Diefenbach, pray this Honorable Court to grant the instant Petition for Certiorari and to provide such relief as this Honorable Court deems fit and proper.

Respectfully submitted,

Richard Brent Daniel
Attorney for the Petitioners

Appendix A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF GRANT

STATE OF WASHINGTON, Plaintiff,	)	No. 86-1-00123-1
vs.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
SCOTT R. DIEFENBACH and JULIE DIEFENBACH, Defendants.	)	

THIS MATTER came on for hearing before the above-entitled Court on Friday, August 28, 1987, the plaintiff begin represented by Deputy Prosecuting Attorney Peter G. Wales, the defendant, SCOTT DIEFENBACH, begin represented by Brent Daniels, and defendant, JULIE DIEFENBACH, being represented by Steve Zimmerman of Platts, Zimmerman & Estes, and the Court having reviewed the files and records herein, the memorandums of authority filed on behalf of the defendants, JULIE DIEFENBACH and SCOTT DIEFENBACH, and the motion of the

defendants to suppress the physical evidence, and the court being fully advised in the premises; NOW, THEREFORE, hereby makes the following Findings of Fact and Conclusions of Law:

UNDISPUTED FACTS:

On May 16, 1986, a search warrant was issued upon an affidavit containing information supplied by confidential informant. A search warrant was executed on that same date at the address of Scott R. Diefenbach and Julie Diefenbach.

The defendants were charged by information on July 21, 1986, with violation of the Uniformed Controlled Substance Act.

DISPUTED FACTS:

The defendants challenged the validity of the search warrant and supporting affidavit on its face on the grounds that the affidavit, containing hearsay information supplied by a

confidential informant to the affiant, contained insufficient facts for an independent magistrate to find probable cause to allow a search of the premises.

The defendants contended that the affidavit did not establish a substantial factual basis to support a search warrant; that the issue of a search warrant requires a substantial factual showing upon which an independent magistrate may make an informed conclusion.

COURT'S FINDINGS AS TO THE DISPUTED FACTS:

That the affidavit contained insufficient facts; that without sufficient facts, the affidavit did not provide probable cause for the issuance of the search warrant.

COURT'S REASON FOR INADMISSIBILITY OF EVIDENCE SOUGHT TO BE SUPPRESSED & ORDER

That because the affidavit contained insufficient facts the evidence obtained during the execution of the search warrant must be suppressed for lack of probable cause to issue

the search warrant, and the Court so orders. This Order is effective retroactive to August 28, 1987.

DONE IN OPEN COURT this 29 day of September, 1987.

/s/
SUPERIOR COURT JUDGE

Presented By:

PLATTS, ZIMMERMAN & ESTES
Attorneys for Defendant JULIE DIEFENBACH

By: /s/
Steve Zimmerman

R. BRENT DANIEL
Attorney for Defendant SCOTT DIEFENBACH

By: /s/
R. BRENT DANIEL

Copy received, approved as to form
and notice of presentment waived

By: /s/
PETER G. WALES
Deputy Prosecuting Attorney

Appendix B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant,	)	No. 8939-8-III
v.	)	Division Three Panel Four
SCOTT R. DIEFENBACH and JULIE DIEFENBACH, Respondents.	)	FILED March 23, 1989

SHIELDS, J.--The State appeals an order suppressing evidence seized during a search, terminating its prosecution of Scott R. Diefenbach and Julie Diefenbach. We vacate the order and remand for trial.

The sole issue is whether the affidavit for the search warrant contained sufficient facts to establish a basis for the magistrate to conclude there was probable cause to believe that criminal conduct was occuring.[1]

The affidavit for a search warrant for possession of cocaine and other controlled substances was presented to a Grant County magistrate and signed at 10:15 p.m. May 16, 1986. The pertinent facts contained in the

[1] Neither party contends that the affidavit in this case does not satisfy the dual test for truthfulness and personal knowledge of the informant. Spinelli v. United States, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969); Aguilar v. Texas, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509 (1964).

affidavit were as follows:

> Within the last forty-eight hours of today's date, May 16, 1986, affiant was contacted by a reliable confidential informant and advised th affiant that the informant had been at the residence of SCOTT R. DIEFENBACH residing approximately one mile east of Road "O" Southwest on the north side of Road 25 Southwest, Wahluke Slope, east of Mattawa, Grant County, Washington, and informant stated [he/she] observed cocaine in the residence, and further used cocaine in that residence during the course of purchasing cocaine, all within the last 48 hours of May 16, 1986.

The warrant was executed on May 17, 1986, shortly after midnight at the Diefenbach residence. In the course of the search cocaine, marijuana and drug paraphernalia covered with cocaine and marijuana residue were seized. The Diefenbachs were subsequently charged by information with violation of the Uniform Controlled Substances Act, RCW 69.50.401(a), for possession with intent to manufacture or deliver cocaine. The trial court granted the motion to suppress, noting the affidavit contained insufficient facts to establish probable cause. The court stated the mere presence of cocaine in the house did not establish a sufficient nexus between the drug and any association it may have had to the residents of that house.

In reviewing a search warrant to determine the sufficiency of the affidavit for probable cause, the trial court does not engage in a de novo review. State v. Jackson, 102 Wn.2d 432, 688 P.2d 136 (1984). Deference is due the magistrate issuing the warrant, State v. Cord,

103 Wn.2d 361, 366, 693 P.2d 81 (1985), affidavits should be construed in a common sense manner and doubt should be resolved in favor of the warrant. State v. Partin, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977).

The affidavit in this case informed the magistrate that the informant had been inside the Diefenbach residence within the preceding 48 hours, and there had seen, used and purchased cocaine. It thus presented facts sufficient to issue a search warrant for the Diefenbach residence for evidence of possession of cocaine as distinguished from delivery or manufacturing. The State contends that when some cocaine is present in a house, a reasonable inference exists that more will be found. The Deifenbachs contend that additional facts concerning the amount of cocaine observed, used and purchased are required to provide "a substantial basis for a fair probability that evidence will be found in a particular case", Jackson, at 436. That would be true were we applying the Aguilar-Spinelli test to establish both the informant's basis of knowledge and the informant's credibility, issues which are not involved in this appeal. Those issues aside, an affidavit need not establish proof of criminal activity but merely probable cause to believe it has occurred. State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

The court in State v. Maffeo, 31 Wn. App. 198, 202, 642 P.2d 404, review denied, 97 Wn.2d 1012 (1982) concluded the presence of some cocaine supports an inference that more will be found at the place of operation, citing 1 W. LaFave, Search & Seizure § 3.7 (1978) and United States v. Valenzuela 596 F.2d 824 (9th Cir. 1979), cert. denied, 441 U.S. 965, 60 L. Ed. 2d 1071, 99 S. Ct. 2415 (1979). The

personal observation by the informant is a sufficient basis on which to presume the presence of additional cocaine, based upon the informant's direct participation in the drug transaction. See Smith v. Smith, 110 Wn.2d 658, 663, 756 P.2d 722 (1988), cert. denied, ___ U.S. ___, ___ L. Ed. 2d ___, 109 S. Ct. 867 (1989); Jackson, at 437; and People v. Conklin, 139 A.D.2d 156, 531 N.Y.S.2d 374, appeal denied, 72 N.Y.2d 1044, 531 N.E.2d 663, 534 N.Y.S.2d 943 (1988). Since the informant obtained cocaine from the house, "[i]t follows that the magistrate could reasonable infer that there would be more cocaine in the house." State v. Mejia, 111 Wn.2d 892, 901, 766 P.2d 454 (1989).

The trial court order granting the motion to suppress is vacated and the cause is remanded for trial.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

/s/ _____

WE CONCUR:

/s/ _____

/s/ _____

APPENDIX B

Appendix C

THE SUPREME COURT

State of Washington

June 6, 1989

Mr. R. Brent Daniel
Attorney at Law
2200 6th Avenue
1250 Denny Bldg.
Seattle, Washington 98121

Platts, Zimmerman & Estes
Mr. Steven Zimmerman
P. O. Box 653
Wenatchee, Washington 98801

Honorable Paul A. Klasen, Jr.
Grant County Prosecutor
Ms. Mary Ann Brady, Deput
P. O. Box 37
Ephrata, Washington 98823

Re: Supreme Court No. 56103-6 -
State v. Scott Robert Diefenbach, et ux.
Court of Appeals No. 8939-8-III

Counsel:

The above entitled petition for review was considered by the Court on its June 6, 1989, petition for review calendar.

Appendix C

The petition was denied by order number 191/103 filed on June 6, 1989.

Sincerely,

/s/
C. J. MERRIT
Supreme Court Clerk

AJE:csd

Appendix C

Appendix D

DISTRICT COURT OF WASHINGTON FOR GRANT COUNTY

STATE OF WASHINGTON)
) ss. AFFIDAVIT FOR SEARCH
County of Grant) WARRANT

THE UNDERSIGNED, ON OATH, STATES:

1. That I believe that evidence of the crime(s) of Violation of Uniform Controlled Substance Act-Possession Cocaine & other controlled substances or contraband, the fruits of a crime, or things otherwise criminally possessed; or weapons, or other things by means of which a crime has been committed or reasonably appears about to be committed (describe items to be seized):

Cocaine and any and all illegal controlled substances, any paraphernalia associated with the use or distribution of a controlled substance, and documents tending to show occupancy of the residence.

are concealed in Grant County, Washington; in, on, or about certain premises, vehicles, or persons(s) (area to be searched - description):

A new log construction, two story home, located in the southeast quarter of the southeast quarter of Section 3, Township 14, Range 24 EWM, approximately one mile east of Road "O" southwest on the north side of Road 25 Southwest, approximately five (5) miles east and one mile south of Mattawa, Grant County, Washington. Also, the persons of SCOTT R. DIEFENBACH and JULIE DIEFENBACH. Also any out buildings associated with the residence.

APPENDIX D

2. That my belief is based upon the following facts and circumstances:

A. Background of officer (or other Affiant):

Affiant has been employed by the Grant County Sheriff's Office for the past three and one-half years and prior to that was employed by the Chelan County Sheriff's Office for a period of 16 years. Affiant worked in the position of Sgt. and of Captain with Chelan County, and on numerous occasions was party to narcotics seizures and investigations. Affiant did while employed with the Chelan County Sheriff's Office work undercover in drug investigations, and also has attended the FBI National Academy at Quantico, Va., where numerous classes were taken, including forensic science classes. Affiant has in past investigations purchased controlled substances and has observed cocaine in use.

B. Basic facts of crime being investigated:

Possession of controlled substance - Cocaine.

C. Circumstances supporting probable cause:

Within the last forty-eight hours of today's date, May 16, 1986, affiant was contacted by a reliable confidential informant and advised the affiant that the informant had been at the residence of SCOTT R. DIEFENBACH residing approximately one mile east of Road "O" southwest on the north side of Road 25 Southwest, Wahluke Slope, east of Mattawa, Grant County,

Washington, and informant stated observed cocaine in the residence, and further used cocaine in that residence during the course of purchasing cocaine, all within that last 48 hours of May 16, 1986.

The informant wishes to remain anonymous due to the potential for violence for revealing narcotics trafficing.

Informant is familiar with cocaine and can readily identify same due to the following experiences which the informant has related to the affiant:

a. The informant states that he has used controlled substances in the past, including cocaine.

b. The informant states that he has seen cocaine in it's packaged form, including papers and bindles.

c. The informant stated that he is familiar with the pricing of cocaine and other drugs.

The information provided by the informant is considered reliable due to the following police experiences with the informant:

a. Confidential informant has provided the Chelan County Sheriff's Department with information leading to twenty-six (26) separate case arrests in Chelan County for the possession of heroine, cocaine and marijuana. Of those twenty-six 926) cases, twenty-five convictions have been received.

b. The informant has participated in two reliability buys of controlled substances. These consisted of the informant advising officers of a person known to the informant who sells controlled substances. Then agreeing to purchase controlled substances under the directions and control of those officers, in the County of Grant.

c. In each case the informant was searched prior to the transaction, allowed only to carry police buy money, and personally observed by the officers during the transactions. Drugs purchased in those buys have been tested by the Crime Lab and verified to be what the informant stated. These controlled buys were under the direction of Investigator Michael Shay, of the Grant County Sheriff's Department.

d. Prior information supplied by this informant has been checked and verified by the affiant using other investigation means.

e. Prior information the informant has provided has been verified also by other informants.

Affiant has had contact with Investigator Richard F. Jenkin of the Grant County Sheriff's Department and affiant was advised by Investigator Jenkin that SCOTT R. DIEFENBACH does reside approximately one mile east of Road "O" southwest on the north side of Road 25 Southwest, Wanluke Slope, east of Mattawa, Grant County, Washington And informant stated

he observed cocaine in the residence in the County of Grant.

/s/
AFFIANT

Larry G. Hively, Undersheriff
AGENCY AND TITLE: Badge #2

3. Summary of additional evidence (if applicable):

SUBSCRIBED AND SWORN TO before me this:

16th day of May, 1989 at 10:15 p.m. time.

/s/
JUDGE

APPROVED:

DEPUTY PROSECUTING ATTORNEY

APPENDIX D